KEDAH CEMENT SDN BHD

v.

AHMAD RAZIF ABDULLAH

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[ORIGINATING MOTION NO: R1-25-140-98]
29 JUNE 2001

LABOUR LAW: *Industrial Court - Award - Application for certiorari to quash - Whether Industrial Court had acted in excess of jurisdiction*

The respondent was an employee of the applicant company since 18 October 1993 and was a senior executive in the company. He left the company after a dispute over accommodation. His letter dated 15 February 1996 had set out his grievances.

The company in a letter dated 15 March 1996 gave the respondent an option, providing alternative accommodation which the respondent had rejected. On 18 March 1996, the respondent wrote a final letter to the applicant.

The Industrial Court in an award held that the respondent had been constructively dismissed and reinstated him in the company and ordered backwages to be paid. The applicant now applies for a *certiorari* to quash the whole of the award relying on the ground that the Industrial Court had acted in excess of or without jurisdiction.

The applicant submitted that:

(a) the chairman had erred in law in that he misconstrued the contents of the letter of the applicant dated 15 March 1996;

(b) the chairman had erred when he failed to take into account that the respondent had voluntarily vacated the house that was provided to him;

(c) the chairman had failed to take into account that the respondent was given a choice to stay in the dormitory where he was then staying or be provided with a housing allowance pending availability of apartment.

Held:

[1] The chairman had concluded and accepted the submission of counsel for the respondent that the applicant had in fact breached its terms and conditions of the contract and that in response to the breach the respondent had left the applicant company. (p 379 d)

[1a] The chairman had also accepted the submission that since the evidence and facts adduced in court by the respondent stood unrebutted and uncontradicted, the respondent's story must be accepted by the court. (p 379 d)

[1b] None of the matters raised by the applicant therefore showed any error of law on the part of the Industrial Court. What the applicant has in fact done was to request this court for a reassessment of the evidence and for it to substitute other findings made by the Industrial Court and this the Court cannot do. The judicial review process should not be used as a cloak of appeal in disguise. (p 379 g)

[Application dismissed with costs.]

Case(s) referred to:

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 ***(refd)***

Tan Hin Jin & Anor v. Prabhulal G Doshi [1971] 1 MLJ 274 ***(refd)***

For the applicant - Vijayan Venugopal; M/s Shearn Delamore
For the respondent - KP Gengadharan; M/s Genga Maha Wong & Co

Reported by Mariette Peters-Goh

JUDGMENT

KC Vohrah J:

The Industrial Court in Award No. 570 of 1998 had held that Ahmad Razif bin Abdullah, the claimant, in the case before it had been constructively dismissed by the company, Kedah Cement Sdn Bhd. It reinstated him in the company and ordered backwages to be paid.

The company has applied for an order of *certiorari* to quash the whole of the award relying on the ground that the Industrial Court had acted in excess of or without jurisdiction.

The claimant had been an employee of the company since 18 October 1993 and was a senior executive, the personnel and industrial relations officer in the company.

The claimant left the company after a dispute with the company over accommodation which had not been resolved. This letter of 15 February 1996 by the claimant to the company sets out the grievances of the claimant:

KEDAH CEMENT SDN BHD
(A member of the Kedah Cement Holdings Berhad Group)

MEMORANDUM

From: Ahmad Razif Abdullah
(W/No. 711) To: Personal Manager

Date: Feb. 15, 1996 c.c: General Manager, Production Group
Human Resource Manager

Subj: BREACH OF AGREEMENT FOR PROPER ACCOMMODATION

I am a Senior Executive with the Company since 1993 and have been accommodated in a semi-detached house since the same period. However recently I became a victim of circumstances and was forced out of my own house. I relate below the events leading to this situation.

In early January 1996, I came to know through conversations with the Administration Manager, Personnel Manager and the Group Human Resource Manager that a Senior Executive was coming to join the Company and needed housing type accommodation which is similar to mine. The Company had none available at the time. In fact there was also another Executive in waiting list go into the same housing type as well at the time. There seemed to be no solution then to overcome this problem.

At about the same time I also recalled Administration Manager telling me that apartment type accommodation will be available by 16th January 1995 due to the departure of the Turkish employees. However Mr. Huang General manager Production was insisting for a housing type accommodation for this new Senior Executive.

Seeing no solution in hand, I went to see En. Elias Khan the Group Human Resource Manager on 9th January 1996 and stuck a deal with the Company. I suggested that I would volunteer to leave the house on the condition that the Company will provide me an apartment type dwelling in exchange. To this the Company agreed and had informed the General Manager Production that the housing problem for the new Senior Executive had been resolved.

On the 10th January 1996, the Administration and Personnel Manager called me to ask me whether it was possible for me to move out of the house within 24 hours notice as the new Executive was coming in on 12th January 1996. Taking the Company's interest at hand I agreed and moved out on the very same day. I was given a dormitory type housing for the time being as the apartment type was not expected to be ready until 16/1/96.

I had to wait until the end of January before I was notified that the apartment will be ready for me on 6/2/96. The date was due to the Turkish employees who had extended their stay until the end of January. To all this, I accepted

in the true spirit of cooperation. However, when I inquired for the keys to the apartment on 8/2/96, I was informed that Mr. Huang had instructed not to give to anyone the apartments as he had other plan in mind. So I was still unable to enter the apartment.

Due to this, I went back to see GHRM who told me he was strictly instructed by Mr Huang not to give the apartment to others. I then asked his permission to see Mr. Huang and to this he agreed.

I went to see Mr. Huang on the same day (8th February) to seek explanation. True he had instructed not to give the apartments to anyone. He asked me who had promised me the apartment? I told him the Company. I also told him that I left the house in good faith to help out the Company. In fact I told Mr. Huang it was for his friend the new Executive. So I expected the Company to keep its part of the deal. Mr. Huang refused to consider my appeal. To this I told Mr. Huang that I must then insist that I go back to my house of which he said it was not possible.

Feeling disgusted and cheated by the whole affair, I am now writing formally to the Company to return me to my former status since the Company cannot keep its part of the deal. I expected this to be resolved within 1 week from the date of this memo.

With due respect to everyone involved I must tell you that I don't intend to give up my right to the deal and that if the matter is not resolved within the stipulated period above I will have to refer this matter for both MD's attention.

Signed:
(AHMAD RAZIF BIN ABDULLAH)

The claimant gave evidence at the hearing. He called one witness CLW1, an employee of the company. The company did not call any witness to testify for its case.

The claimant's grievances were not resolved and this time he gave the company notice of constructive dismissal dated 14 March 1996 which reads:

14th March 1996

Group Human Resource Manager
Kedah Cement Sdn. Bhd.
Teluk Ewa, Mukim Air Hangat
07000 Langkawi

Dear Sir,

NOTICE OF CONSTRUCTIVE DISMISSAL

There has been no settlement in sight to my grievance despite my appeals to the Company via my letters of 15th & 23rd February 1996 and the many

meetings with you and other authorised personnel to resolve the issue. Following events had taken place since then:

i) GHRM and Personnel Manager through a meeting with them on 1st March 1996 told me to wait till 5th March 1996 for an outcome as the MD was still on leave and would only be back on that date.

ii) GHRM through a meeting with him on 5th March 1996 told me that the matter was at MD's attention and advised me to wait for an outcome.

iii) Personnel Manager through a meeting with on 5th & 6th March 1996 told me that he would be meeting the MD on 7th March 1996 and would bring my case up for his attention and reply. He advised me to wait for his return for an answer from the MD.

iv) Personnel Manager through a meeting with him on his return on 8th March 1996 told me that my case would be brought up for decision in the Management meeting on 14th March 1996 and advised me to wait at least until after the meeting for an outcome.

v) Personnel Manager through a meeting with him on 14th March 1996 told me that that the Management meeting was postponed till next week and my case may not be able to be heard till then.

In view of the non-settlement to my grievance with the Company and seeing no solution to it, even after given the Company due time for consideration, I have no alternative but to give you notice to reinstate me to my former benefit by 18th March 1996, failing which I shall consider myself CONSTRUCTIVELY DISMISSED and shall not be coming to work anymore after this date. I shall then get the matter be referred to the Industrial Court for a just settlement.

I appeal to you to please settle the matter amicably within the notice period.

The company in a letter dated 15 March 1996 gave the claimant an option for him either to remain in the dormitory until the apartment fell vacant or to stay out in a private dwelling for which the company would pay housing allowance to the claimant.

The claimant rejected the company's offer as he said that the apartments were already vacant. The chairman of the Industrial Court accepted the evidence of the claimant that the apartments were vacant from 6 February 1996 until he left the company. The chairman was of the view that this evidence was corroborated by the evidence of CLW1, the housing supervisor of the company. This was a perfectly valid finding of fact in the absence of evidence to the contrary by the company.

It is in this context that the next letter of the claimant has to be viewed which was his final letter to the company:

18th March 1996

Group Human Resource Manager
Kedah Cement Sdn. Bhd.
Teluk Ewa, Mukim Air Hangat
07000 Langkawi

Dear Sir,

RE: Notice of Constructive Dismissal

Thank you for your letter of 15th March 1996.

Please be kindly informed that any deviation to our earlier agreement must be accepted and agreed upon by both parties. I have stressed this many times to the Company. So I see no reason why I should consider yet another alternative and a further delaying tactic by the Company. I only insist what is my right to our earlier agreement. So I have to reject your explanation and offer: and will stick to my letter of notice of 14th March 1996.

Yours sincerely,

Signed
Ahmad Razif bin Abdullah
Personnel & Industrial Relation Officer

Copies to: Joint Managing Directors
General Manager, Production Personnel Manager.

It was submitted by counsel for the company that the chairman erred in law in misconstruing the contents of the letter of the claimant dated 15 March 1996 and that it had failed to consider cl. 20 of the scheme of service of executives" which applied to the claimant. Clause 20:1 is to the effect that the company "shall provide free housing to all executives in the Langkawi plant" and that a housing allowance as shown in an appendix "shall be given to other executives who opt to stay outside in Langkawi." It was also submitted that the chairman had erred in failing to take into account that the claimant had voluntarily vacated the house which was provided to him and that he had also failed to take into account that the claimant was given a choice to stay in the dormitory where he was then staying or be provided with a housing allowance as stated under cl. 20 pending availability of an apartment. In other words the company was not given a chance to honour its obligation to him, that is to say, the apartments were occupied at the material time.

But as was pointed out by the chairman he had accepted the evidence of the claimant that the apartments were vacant from 6 February 1996 and clearly the chairman had in mind cl. 20 relating to accommodation.

Counsel for the company had adverted to the contents of letter of the company dated 15 March 1996 to the claimant where it was stated that the claimant had been informed that the apartments had been allocated to TA Cement Plant. But the chairman had examined the letter and this assertion carefully and then came to this valid conclusion of fact:

> The Company's submission that the Company had to allocate the apartments to TA Cement Plant Expansion Project Line No. 2 from GAMA does not hold water as there is no evidence to substantiate this piece of evidence. The claimant in his testimony had said that he was never informed of this.

It will be noted that the chairman concluded and accepted the submission of counsel for the claimant that the company had breached its terms and conditions of contract and that in response to the breach he had left the company without delay. The chairman also accepted the submission that since the evidence and facts adduced in court by the claimant and CLW1 stood unrebutted and uncontradicted, the claimant's story must be accepted by the court. He then adverted his mind to the principle that constructive dismissal denotes conduct by an employer amounting to a breach of contract such as entitles the workman to terminate the contract summarily and stated that the main issue before the court was whether the company was guilty of conduct which was a significant breach going to the root of the contract of employment and he held:

> After careful consideration of all the evidence before me and the submissions of the counsel and from a reasonable inference of all the surrounding circumstances of the case this Court finds that the company has breached the fundamental terms of the contract of employment when it failed to allocate the apartment as promised by the Company.

None of the matters raised by the company show any error of law on the part of the Industrial Court. What the company has in fact done was to request this court for a reassessment of the evidence and for it to substitute other findings for the findings made by the Industrial Court and that this court cannot do. The judicial review process should not be used as a cloak of a appeal in disguise (see *Tan Hin Jin & Anor v. Prabhulal G Doshi* [1971] 1 MLJ 274 (FC), *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 (SC), *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687 (FC)).

The application is dismissed with costs.